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SUBJECT: PWC CASE: "PLEADING THE FIFTY_FIRST"

REF: MOSCOW 5083

1. (U) This message is sensitive but unclassified and not for internet distribution.

Summary

2. (SBU) On October 26, PricewaterhouseCoopers Russia (PWC) refused to submit documents on the auditing firm's worldwide staff that an appellate arbitration court had demanded earlier in the month (reftel). PWC invoked Article 51 of the Russian Constitution, which provides protection against self-incrimination, as its basis for not complying with the court's demands. Our contacts observe that this may be the first time a corporation in Russia has attempted to use in its defense a right that has historically been applied only to individuals. They also agree that the tactic is not likely to be effective in this case. End Summary.

PWC Refuses to Comply...

3. (SBU) On October 26, the Russian office of PWC told the 9th Appellate Arbitration Court in Moscow that it would not comply with the court's request for access to the auditing firm's worldwide personnel files. On October 12, the court had demanded that the Federal Tax Service (FTS) be granted access to these files as part of the latter's investigation into the extent of tax evasion by former oil giant YUKOS. In that session, the court upheld the FTS claim that PWC had colluded with YUKOS to defraud the GOR out of billions in tax revenue (reftel). The FTS had argued: PWC was the YUKOS auditor of record for almost 10 years; and PWC acknowledged in June 2007 that YUKOS had not fully disclosed information relevant to the auditing process. In light of these facts, FTS maintained, it had a right and a duty to investigate where and how else YUKOS might have schemed to evade taxes.

And PWC Pleads the "51st"

4. (SBU) PWC said during the October 26 session that its basis for not complying with the court's demands was Article 51 of the Russian Constitution. The article provides protection against self-incrimination, stating that no one shall be compelled to give testimony against him/herself, the person's spouse or close relatives. Our contacts could not recall and had found no precedent of an instance in which a corporation had invoked this provision of the Russian Constitution.

¶5. (SBU) Alexander Gomonov, a corporate counselor at Baker and Botts in Moscow, said that PWC's decision will force Russia's legal system into uncharted waters. Article 51 has so far only been invoked by individuals and predominately in criminal cases. Gomonov expressed doubt that the appellate arbitration court would set a precedent by permitting this particular approach. He explained that, regarding criminal law, the legal standing of corporations has only recently begun to develop. Since 2002, the criminal code has allowed corporations to be classified as potential victims of crimes, but not yet as defendants.

¶6. (SBU) Albert Eganyan, an attorney at the Vegas-Lex law firm, agreed with Gomonov's skepticism but was more emphatic. He said the 9th Appellate Arbitration Court would be an unlikely venue for a multi-precedent setting decision. If the court upheld PWC's argument, it would grant a corporation unprecedented standing, in a civil case, on the basis of a right which the Russian legal system has only assessed in criminal proceedings. Eganyan said PWC's attorneys deserve credit for their creativity, "but it won't work."

¶7. (U) Yuliy Tay of the Bartolius Law Firm said that whether or not the court allows PWC to use Article 51, "this will not release PWC from the court's injunction to provide personnel files." Tay noted that even in the U.S., where a corporation's rights and responsibilities under criminal and civil statutes are more developed, corporations may not employ a blanket refusal "to produce" documents, which "are not testimony."

Comment

¶8. (SBU) PWC's unprecedented use of Article 51 as a basis for not furnishing documents seems unlikely to be successful. We'll know November 28, when the next session of the appeal will be held.
BURNS